ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	
Petition for Rulemaking of Public Employees for Environmental Responsibility	RM No. 9913

COMMENTS OF TYCOM NETWORKS (US) INC.

TyCom Networks (US) Inc. ("TyCom"), a subsidiary of TyCom Ltd., hereby comments on the petition for rulemaking filed by Public Employees for Environmental Responsibility ("PEER").[1] TyCom Ltd. is one of the world's leading integrated suppliers of undersea communication systems and services, and is presently developing the world's most extensive and most advanced global undersea telecommunications fiber-optic network, the TyCom Global Network. As such, TyCom has a strong interest in ensuring that the Commission continues to achieve a fair balance between environmental concerns and consumer demand for undersea cable capacity. As a responsible corporate citizen, TyCom strongly supports the Commission's longstanding environmental processing rules, which implement the National Environmental Policy Act ("NEPA") and the National Historic Preservation Act ("NHPA"). These rules have worked well to address environmental concerns and consumer demand for bandwidth capacity while satisfying the legal requirements of NEPA and the NHPA. TyCom sees no reason for the Commission to alter its environmental processing rules.

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[1] *See* Public Employees for Environmental Responsibility, Petition for Rulemaking, RM No. 9913 (filed May 17, 2000) ("PEER Petition"); Public Notice, CIB Reference Information Center Petition for Rulemaking Filed, Report No. 2426 (July 14, 2000).

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I. BACKGROUND ON NEPA

Under NEPA, federal agencies—such as the Commission—must establish procedures to identify and account for the environmental impact of projects they undertake or authorize.[2] To that end, NEPA established the Council on Environmental Quality ("CEQ"), tasking it to oversee the programs and activities of the federal government in order to determine whether those programs and activities are contributing to the achievement of U.S. environmental policy.[3] CEQ's regulations "tell federal agencies what they must do to comply with the procedures and achieve the goals of [NEPA]."[4]

The CEQ has established a three-tiered approach to NEPA implementation and compliance which applies to all federal agencies, including the Commission. *First*, for "major Federal actions significantly affecting the quality of the human environment," NEPA requires agencies to prepare an environmental impact statement ("EIS").[5] *Second*, for major actions that may significantly affect the quality of the human environment, the CEQ permits federal agencies to prepare an environmental assessment ("EA") to determine whether an EIS is necessary.[6] *Third*, for activities that individually and cumulatively do not significantly affect the quality of the human environment and for which environmental analysis would be required only in extraordinary circumstances, the CEQ allows federal agencies to exclude categorically those activities from evaluation under NEPA.[7] The EA and categorical exclusion provisions of the CEQ's regulations make plain that not every action of a federal agency is a "major" action with "significant"—or even certain—environmental effects.

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2 42 U.S.C. §§ 4321-4370e.

3 42 U.S.C. § 4344(3).

4 40 C.F.R. § 1500.1.

5 42 U.S.C. § 4332.

6 40 C.F.R. § 1508.9.

7 40 C.F.R. § 1508.4.

As for matters of historic preservation, Section 106 of the NHPA requires federal agencies to consider the effects of their actions upon properties included in, or eligible for inclusion in, the National Register of Historic Places.[8] To that end, NHPA established the Advisory Council on Historic Preservation ("ACHP") to implement the NHPA. Both the NHPA and the ACHP's regulations require that, for actions affecting historic properties, federal agencies initiate a consultation process with the appropriate State Historic Preservation Officer ("SHPO") and the ACHP.[9]

II. THE COMMISSION'S ENVIRONMENTAL PROCESSING RULES ARE PROPER UNDER NEPA AND THE NHPA

The Commission's well-established environmental processing rules comport fully with NEPA and the CEQ's regulations. They also comport fully with the NHPA and the ACHP's regulations.

A. NEPA Compliance

Pursuant to NEPA and the CEQ regulations, the Commission published its environmental processing rules in 1974 and revised them in 1986.[10] The Commission has adopted the CEQ's three-tiered approach for environmental processing of applications for Commission authorizations, (1) requiring Commission-prepared EISs for actions which normally have a significant impact on the environment, (2) requiring applicant-prepared EAs for actions that may have a significant impact on the environment, and (3) categorically excluding from environmental processing actions "deemed individually and cumulatively to have no significant

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[8] 16 U.S.C. § 470f.

[9] *Id.*; 36 C.F.R. § 800.3(c).

[10] *Implementation of the National Environmental Policy Act of 1969, Report & Order*, 49 FCC.2d 1313 (1974) ("*First NEPA Order*"); *Amendment of Environmental Rules in Response to New Regulations Issued by the Council on Environmental Quality, Report & Order*, 60 Rad. Reg. 2d (P&F) 13 (1986) ("*Second NEPA Order*").

effect on the quality of the human environment."[11] EISs are prepared by the responsible bureau of the Commission in draft and final form, and must summarize submissions to the Commission and provide *the bureau's* analysis of the proposal in terms of environmental consequences, reasonable alternatives, and recommendations.[12] The Commission does not permit "self-certification," as PEER suggests,[13] but instead gathers information from private parties and other government agencies to make an independent determination of environmental impact.

With respect to submarine cables, the Commission decided in 1974 that an application for a submarine cable landing license would be categorically excluded from environmental processing.[14] The Commission found:

> Although laying transoceanic cable obviously involves considerable activity over vast distances, the environmental consequences for the ocean, the ocean floor, and the land are negligible. In shallow water, the cable is trenched and immediately covered; in deep water, it is simply laid on the ocean floor. In the landing area, it is trenched for short distance between the water's edge and a modest building housing facilities.[15]

When the Commission changed its environmental rules in 1986, it did not include a categorical exclusion for submarine cables.[16] Later finding that the underlying factual basis for the categorical exclusion had not changed, the Commission reinstated the categorical exclusion in a

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[11] 47 C.F.R. §§ 1.1305 (actions that normally have a significant environmental impact), 1.1306 (categorical exclusions), and 1.1307 (actions that may have a significant environmental impact).

[12] 47 C.F.R. §§ 1.1314, 1.1317.

[13] PEER Petition, at 5.

[14] *First NEPA Order*, 49 FCC.2d at 1321.

[15] *Id.*; *1998 Biennial Regulatory Review—Review of International Common Carrier Regulations, Report & Order*, 14 FCC Rcd. 4909, 4938 (1999) ("*Further Streamlining Order*").

[16] *See Second NEPA Order*, 60 Rad. Reg. 2d (P&F) 13. The omission was apparently an oversight. *See Further Streamlining Order*, 14 FCC Rcd. at 4938.

1999 rulemaking, during which no party objected to the Commission's proposal to reinstate the categorical exclusion.[17] Cable landing licenses now reflect this categorical exclusion.[18]

In spite of the categorical exclusion, however, the Commission grants each cable landing license subject to the following condition:

> The Commission reserves the right to require the Licensee to file an environmental assessment or environmental impact statement should it determine that the landing of the cable at those locations and construction of necessary cable landing stations would significantly affect the environment within the meaning of Section 1.1307 of the Commission's procedures implementing the National Environmental Policy Act of 1969; this license is subject to modification by the Commission upon its review of any environmental assessment or environmental impact statement that it may require pursuant to its rules.[19]

Thus, although submarine cables are categorically excluded from environmental processing in the application phase, they remain subject to Commission oversight for purposes of environmental compliance. PEER's concern that the submarine cable licensing process disregards NEPA is therefore unwarranted,[20] as the Commission already and explicitly conditions cable landing licenses on continuing NEPA compliance.

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[17] *Id.*; 47 C.F.R. § 1.1306, n.1 (stating that the construction of new submarine cables is categorically excluded from environmental processing). PEER did not comment on the proposals in the Commission's 1999 rulemaking.

[18] *See, e.g., AT&T Corp. et al., Cable Landing License*, 14 FCC Rcd. 13,066, 13,082 (Int'l Bur. 1999) ("*JUSCN Order*") (noting that the cable landing license application for the Japan-U.S. Cable Network was excluded from environmental processing under 47 C.F.R. § 1.1306 n.1). PEER suggests that the Commission acknowledged a problem in the *JUSCN Order*, when in fact this applied longstanding environmental processing rules. *See id.*; PEER Petition, at 2-3.

[19] *See, e.g., Worldwide Telecom (USA) Inc., Cable Landing License*, 15 FCC Rcd. 765, 771 (Int'l Bur. 2000) (authorizing the Hibernia cable system).

[20] *See* PEER Petition, at 4-5.

PEER has not demonstrated that the Commission's environmental processing rules violate either NEPA or the CEQ's regulations. PEER's petition does not even reference the CEQ's regulations, on which the Commission's three-tiered approach to NEPA implementation is based. Nor does it suggest that the CEQ's regulations themselves violate NEPA.

B. NHPA Compliance

With regard to historic preservation matters, the Commission adopted further regulations in 1988 to implement the NHPA.[21] The Commission's NHPA regulations piggyback on the Commission's environmental processing rules with respect to EAs. They require the applicant to submit an EA if the proposed facility "may affect districts, sites, buildings, structures or objects, significant in American history, architecture, archeology, engineering or culture, that are listed, or are eligible for listing, in the National Register of Historic Places."[22] To determine whether a proposed facility affects a historical property of national significance, the applicant may inquire with the appropriate SHPO.[23] Whenever an EA is prepared on the basis of potential effect on historic properties, the Commission must "solicit and consider the comments of the Department of Interior, the State Historic Preservation Officer, and the Advisory Council on Historic Preservation, respectively, in accordance with their established procedures."[24] The NHPA does not require a separate "Section 106 Review," as PEER suggests,[25] but mandates only that the

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[21] *See Amendment of the Commission's Environmental Rules, Order*, 3 FCC Rcd. 4986 (1988) (implementing requirements of NHPA, the Endangered Species Act, and the American Indian Religious Freedom Act).

[22] 47 C.F.R. § 1.1307(a)(4).

[23] *Id.*

[24] 47 C.F.R. § 1.1308(b).

[25] PEER Petition, at 12.

governmental authority licensing an undertaking with potential impact on a historical site afford the ACHP "reasonable opportunity to comment with regard to such undertaking."[26] The Commission's procedures do just that.

Contrary to PEER's statements,[27] applicants for facilities must comply with the Commission's NHPA regulations, and are directed to consult with SHPOs to determine if their proposed actions would affect historic properties of national significance. Moreover, if an EA is required and submitted, the Commission must consult with the Department of Interior, the appropriate SHPO, and the ACHP. PEER has not shown that the Commission's NHPA regulations violate the NHPA or the ACHP's regulations or that the Commission's implementation of these provisions would necessitate a rule change.

III. PEER'S PROPOSALS ARE UNNECESSARY AND INCONSISTENT WITH NEPA AND THE NHPA

PEER has proposed that the Commission adopt a process for environmental processing that is unnecessary and possibly inconsistent with NEPA and the CEQ's regulations. For matters of historic preservation, PEER has also made unnecessary proposals.

First, PEER's proposal to treat all actions as having actual or potentially significant environmental effects is inconsistent with NEPA and the CEQ's regulations. The CEQ's three-tiered approach to NEPA—which the Commission has implemented—serves to identify those activities and programs that are most likely to affect the environment. As the CEQ notes in its regulations:

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[26] 16 U.S.C. § 470f.

[27] *See* PEER Petition, at 12.

> NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.[28]

To adopt a rule that all actions have actual or potential significant environmental effects, the Commission would have to find that, in practice, all actions *do* have actual or potential significant environmental effects. The Commission has never made such a finding, and PEER's petition presents scant evidence to support such a finding.

Second, PEER's proposal to distinguish between public and private facility elements—subjecting the former to mandatory EA filings and the latter to mandatory EIS filings—may violate the CEQ's regulations, which require federal agencies to examine the actual or potential environmental effects of an activity or program, not the nature of the facility.[29] PEER's approach would likely obscure actual and potential environmental effects by decoupling the Commission's environmental processing of applications from analysis of actual and potential environmental effects. Moreover, with respect to submarine cables, PEER's proposal is unnecessary.[30] Submarine cables are licensed under the Cable Landing License Act of 1921, which makes no mention of, much less a distinction between, common carriers and non-common carriers.[31] The Commission subjects *all* submarine cable applications to the same treatment under its environmental processing rules and to the same licensing conditions.[32]

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[28] 40 C.F.R. § 1500.1(c).

[29] 42 U.S.C. § 4332; 40 C.F.R. § 1508.9.

[30] *See* PEER Petition, at 6-9.

[31] "An act relating to the Landing and Operation of Submarine Cables in the United States," *codified at* 47 U.S.C. §§ 34-39 ("Cable Landing License Act"); Executive Order No. 10,530, *codified at* 3 C.F.R. § 189 (1954-1958), *reprinted in* 3 U.S.C. § 301 app. (1988).

[32] *See* 47 C.F.R. § 1.767.

Third, contrary to PEER's allegation,[33] the Commission is entitled to, and indeed should, rely on the submissions and certifications of private parties in environmental processing. The Commission's approach reflects that of the CEQ, whose regulations—which have been upheld by the courts—permit an agency to rely on an environmental assessment prepared by an applicant, but require the agency itself to prepare the EIS if there is there is a major environmental effect.[34] The Commission has adopted extensive regulations for submission of this information, which must be detailed but not argumentative or conclusory.[35] These provisions ensure that the party with the best information regarding the potential effects of the proposed action supplies that information to the Commission in a manner as unbiased as possible. The Commission may also request further information from the applicant and other agencies or entities with jurisdiction or expertise.[36] PEER has not substantiated its claim that these submissions or Commission review thereof has been inadequate or inconsistent with NEPA.

Fourth, PEER's proposals to create an Office of Environmental Compliance and to require amendments of all existing applications, licenses, and certificates would overwhelm the Commission in unnecessary paper and bureaucracy.

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[33] *See* PEER Petition, at 4-5.

[34] 40 C.F.R. § 1506.5(b). *See also Friends of the Earth v. Hintz*, 800 F.2d 822, 834-35 (9th Cir. 1986) (holding that agency's decision to rely on information submitted by a private party to make a permitting decision was neither arbitrary and capricious nor in violation of NEPA, and noting that otherwise requiring the agency to conduct independent fact-finding would place "unreasonable and unsuitable responsibilities" on the agency); *Save the Bay, Inc. v. U.S. Corps of Engineers*, 610 F.2d 322, 334 (5th Cir.) (holding that agency's determination that no EIS was required was reasonable and based on substantial evidence, including submissions from other government agencies), *cert. denied* 449 U.S. 900 (1980).

[35] 47 C.F.R. § 1.1311(b).

[36] 47 C.F.R. § 1.1308(b), note.

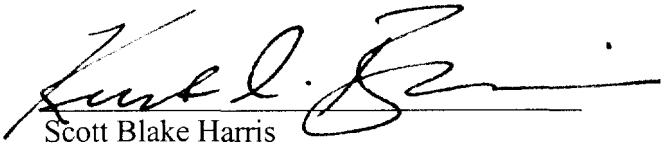
Finally, with respect to the NHPA, PEER suggests that all facilities applicants prepare EAs and route them through the appropriate SHPO prior to submission to the Commission.[37] As noted above in part II.B, applicants for facilities must submit EAs only where the proposed facilities may effect historic properties of national significance, and in any event, are not required to consult with SHPOs. And to the extent PEER makes a proposal for a "Section 106 Review," also as noted above, no such review is required under the NHPA.

CONCLUSION

For the reasons stated above, TyCom believes that PEER's petition for rulemaking should be dismissed, as PEER has not made a compelling legal or factual case for a change in the Commission's implementation of NEPA and the NHPA.

Respectfully submitted,

TYCOM NETWORKS (US) INC.



Scott Blake Harris
Kent D. Bressie
HARRIS, WILTSHIRE & GRANNIS LLP
1200 18th Street, N.W., Suite 1200
Washington, D.C. 20036-2560
(202) 730-1337

Counsel for TyCom Networks (US) Inc.

Byron S. Kalogerou
Mary Ann Perrone
TYCOM NETWORKS (US) INC.
Patriot's Plaza
60 Columbia Road, Building A
Morristown, New Jersey 07960
(973) 656-8365

14 August 2000

[37] PEER Petition, at 11.

CERTIFICATE OF SERVICE

I, Kent D. Bressie, do hereby certify that copies of the foregoing Comments of TyCom Networks (US) Inc. have been sent by hand on this 15th day of August, 2000, to the following:

Honorable William E. Kennard
Chairman
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

Honorable Susan Ness
Commissioner
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

Honorable Harold Furchtgott-Roth
Commissioner
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

Honorable Gloria Tristani
Commissioner
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

Honorable Michael K. Powell
Commissioner
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

Clint Odom
Legal Advisor
Office of Chairman Kennard
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

Mark Schneider
Senior Legal Advisor
Office of Commissioner Ness
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

Bryan Tramont
Legal Advisor
Office of Commissioner Furchtgott-Roth
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

Adam Krinsky
Legal Advisor
Office of Commissioner Tristani
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

Peter A. Tenhula
Senior Legal Advisor
Office of Commissioner Powell
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

Donald Abelson
Chief, International Bureau
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

Ari Fitzgerald
Deputy Chief, International Bureau
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

Robin Layton
Associate Chief, International Bureau
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

Jim Ball
Associate Chief, International Bureau
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

Linda Haller
Assistant Chief, International Bureau
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

Rebecca Arbogast
Chief, Telecommunications Division
International Bureau
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

Jacquelynn Ruff
Associate Chief, Telecommunications Division
International Bureau
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

Claudia Fox
Chief, Policy & Facilities Branch
Telecommunications Division, IB
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

George S. Li
Deputy Chief, Telecommunications Division
International Bureau
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

Elizabeth Nightingale
Telecommunications Division
International Bureau
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

Kathleen Collins
Telecommunications Division
International Bureau
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

Lisa Choi
Telecommunications Division
International Bureau
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

Frances Eisenstein
Telecommunications Division
International Bureau
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

Justin A. Connor
Telecommunications Division
International Bureau
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

Susan O'Connell
Telecommunications Division
International Bureau
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

Donna Christianson
Telecommunications Division
International Bureau
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

Holly Berland
Administrative Law Division
Office of General Counsel
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

Dianne J. Cornell
Associate Chief
Wireless Telecommunications Bureau
FEDERAL COMMUNICATIONS COMMISSION
445 12th Street, S.W.
Washington, D.C. 20554

Steven W. Lett
Deputy Coordinator
Int'l Communications & Information Policy
Bureau of Economic & Business Affairs
U.S. DEPARTMENT OF STATE
2201 C Street, N.W.
Washington, D.C. 20520

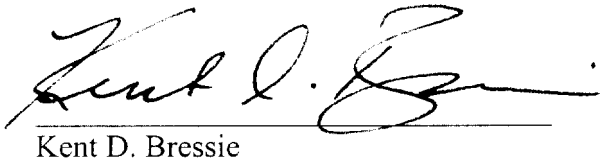
Anthony Cina
Int'l Communications & Information Policy
Bureau of Economic & Business Affairs
U.S. DEPARTMENT OF STATE
2201 C Street, N.W.
Washington, D.C. 20520

Damon Wells
Int'l Communications & Information Policy
Bureau of Economic & Business Affairs
U.S. DEPARTMENT OF STATE
2201 C Street, N.W.
Washington, D.C. 20520

Kenneth A. Schagrin
Deputy Director
Office of International Affairs
U.S. DEPARTMENT OF COMMERCE/NTIA
14th Street and Constitution Avenue, N.W.
Room 4701
Washington, D.C. 20230

INTERNATIONAL TRANSCRIPTION SERVICES
1231 20th Street, N.W.
Washington, D.C. 20036

Daniel P. Meyer
PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY
2001 S Street, N.W., Suite 570
Washington, D.C. 20009



Kent D. Bressie